No. 477

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In the

# SUPREME COURT OF THE UNITED STATES

October Term 1966

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JAMES L. MORRILL,

Petitioner,

v.

ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture; JOHN P. HAUGHEY, Director of Personnel for the United States Department of Agriculture; ROBERT E. HAMPTON, LUDWIG J. ANDOLSEK, and JOHN W. MACY, JR., as members (John W. Macy Jr., being Chairman) of the United States Civil Service Commission; AND THE UNITED STATES OF AMERICA,

Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, James L. Morrill, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit made and entered March 15, 1967, and its order made and entered May 12, 1967, denying his petition for rehearing.

## OPINIONS BELOW

Neither the United States District Court for the Western District of Kentucky (Paducah Division) nor the United States Court of Appeals for the Sixth Circuit has delivered any opinion in this case.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered March 15, 1967. That Court by order made and entered May 12, 1967, overruled petitioner's motion for rehearing. Copies of both rulings are appended hereto.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

This is a suit for judicial review of administrative action resulting in the separation of the petitioner, Mr. Morrill, from his Civil Service "career appointment" position in the Department of Agriculture through alleged "reduction in force".

The questions presented are:

(1) Whether Mr. Morrill's separation complied with Civil Service Regulations; and, if so,

(2) Whether such Regulations complied with the applicable statutes.

## STATUTES, RULES, AND FEDERAL REGULATIONS INVOLVED

This case involves the following statutes, the relevant portions of which are verbatim as follows:

Title 5, U.S.C., Section 652:

"(a) No person in the classified civil service of the United States shall be removed or suspended without

pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. . . . (b) (3) Any person removed or suspended without pay in a reduction of force who, after an appeal to proper authority, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted shall be paid compensation at the rate received on the date of such removal or suspension for the period for which he received no compensation with respect to the position from which he was removed or suspended less any amounts earned by him through other employment during such period. . . ."

Title 5, U.S.C., Section 861:

"In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings . . . Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employes whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

Title 5, U.S.C., Section 1009(e):

". . . the reviewing court . . . shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3)

in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law. . . ."

Title 28, U.S.C., Section 1361:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Title 28, U.S.C., Section 1406:

"(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims . . . ."

This case involves the following regulations: Civil Service Commission Regulations, Part 20 ("Retention Preference Regulations for Use in Reduction in Force", as revised effective May 1, 1961 (F.R.Doc.61-1766) issued under Sec. 11, 19, 58 Stat. 390, 391, as amended), and Federal Personnel Manual, Installment No. 71, the relevant portions of which are verbatim as follows (with official explanations from the Federal Personnel Manual):

5 C.F.R. 20.101

"The regulations in this Part must be followed whenever an agency releases a competing employee from his competitive level by means of separation . . . when the release is required because of . . . reorganization. . . ."

Explanation

". . . (A) separation required by . . . reorganization . . . is a reduction-in-force action. . . .(T) he separation must comply with the reduction-in-force procedures, and employee rights and privileges incidental to reduction in force must be observed. . . ."

5 C.F.R. 20.103(b)

". . . 'Competing employee' means an employee in tenure group I, II, or III . . ."

Explanation

". . . Employees who must be listed apart from the retention register are not competing employees . . . and they must be released before any competing employees in the same competitive level are affected by reduction in force. . . . Persons with temporary appointments with specific time limits in the competitive service are not competing employees; they are released by termination of appointment. . . ."

5 C.F.R. 20.201(d)

". . . The descending order of retention standing by groups is group I, group II, group III. . . ."

Explanation

"Persons . . . with appointments limited to one year or less . . . must be moved out of the competitive level by appropriate means . . . before any employee in group I, II, or III is released from the competitive level by reduction in force. . . . (I)t is in the *inverse order* of retention standing that competing employees are released from the competitive level. . . ."

5 C.F.R. 20.201(e)

"Excepted service. . . . employees who complete one year of current continuous service under temporary appointment are in tenure group III."

5 C.F.R. 20.301

"No competing employee shall be released from a competitive level while another employee with a specifically limited temporary appointment . . . is retained in the competitive level. In addition" . . . (recites exceptions

irrelevant in this case) "no competing employee shall be released from a competitive level while another employee with lower retention standing is retained in the competitive level."

Explanation

"All temporary appointees must be terminated before any competing employee is affected by reduction in force. . . . It is, therefore, completely improper to retain a lower standing employee while releasing a higher standing employee, unless a permissible exception is made. . . ."

5 C.F.R., Section 20.303(a)

"A competing employee selected for release from his competitive level shall be (1) assigned with his consent to a position for which qualified that will last as long as three months, or (2) furloughed, or (3) separated."

Explanation

"The fact that an employee must be released from his competitive level does not necessarily mean that the agency may separate him. He may have a right to some other position in the agency, depending on several factors: (1) His tenure group. (2) His qualifications, (3) The existence of other positions held by employees in lower retention categories. . . ."

5 C.F.R., Section 303(d)

"A group I or II employee in the competitive service shall be assigned under paragraph (a) of this section, rather than furloughed or separated, to a competitive position in another competitive level in his competitive area which will require no reduction, or the least possible reduction, in representative rate whenever a position in the other competitive level is held by (1) an employee in a lower subgroup, or (2) an employee with lower retention standing and the position is one from which the group I or II employee was promoted (or an essentially identical position). . . ."

Note: A change in the Regulations was made effective May 1, 1961, applicable to the date of Mr. Morrill's separation, by Section 103.103(b). The portion of "Federal Personnel Manual" relating to "Reduction in Force" on pages 34-60 inclusive of the Respondents' Brief and Appendix in the Court of Appeals appears to be from an edition published January 19, 1960, and does not cover any changes which became effective May 1, 1961. In fact, handwritten memos at the top of each page point out that it was "Removed by Inst. No. 71", dated June 29, 1962, which includes the May 1, 1961, changes. The offset printed copy of portions of Installment 71 on pages 1sa - 7sa of the appendix to the Reply Brief and Supplemental Appendix filed by the Petitioner in the Court of Appeals reflects "policy changes made in Part 20 (Retention Preference Regulations), May 1, 1961, and other policy changes approved for inclusion in the instructional material", superseding the earlier Chapter R-3 in its entirety.

## STATEMENT OF THE CASE

Mr. Morrill was first employed by the U.S. Department of Agriculture in 1954 as a "Temporary Excepted State Performance Clerk", subsequently being given a "Career-Conditional" appointment, later converted to a permanent "Career Appointment" in the classified "Competitive Service" and was in "Tenure Group I" effective January 27, 1961, as "State Performance Assistant GS-5, Kentucky ASC State Office, Programs Specialist Staff, Performance", with series, grade, and salary of GS-5, $5005.00 per annum, and with rating of "satisfactory".* During all these times his duties were substantially the same.

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*Footnote: Mr. Morrill is a non-veteran, and this case is not complicated by any question of veterans' preferences. Furthermore, both he, as a classified "career" appointee, and all the excepted service workers described in this brief worked out of the Lexington, Kentucky, ASC State Office, so that there is no complication of different competitive areas or commuting areas. Their work was interchangeable and substantially identical.

As of October 4, 1961, he was separated by so-called "reduction in force" action from that position, allegedly because of "reorganization". He was not discharged for cause.

Prior to his separation he was required to and did assist in training other persons who were "Temporary Excepted Employees" to perform the same type services he himself was performing. Some of these were even at the time of the filing of this action performing the same duties the appellant had performed prior to separation, along with other "Temporary Excepted Employees" employed *after* his separation to perform the same duties — about 23 such "temporary excepted employees" in all.

Mr. Morrill was not offered reassignment to any of the positions of the "Temporary Excepted Employees", not even to the one from which he himself had been promoted into the competitive service now held by another "Temporary Excepted Employee".

He first exhausted his administrative remedies, both in the Department of Agriculture and before the Civil Service Commission, and then brought this action in the U.S. District Court (jurisdiction being permitted by 28 U.S.C.A., Sec. 1361) asking (1) restoration to his position, (2) back pay amounting to more than $10,000.00, and, alternatively, if restoration cannot be awarded, (3) assignment to one of the positions held by one of the temporary excepted employees who superseded him in the same job, and (4) transfer of his claim for back pay to the Court of Claims should the U.S. District Court not have jurisdiction to restore such pay.

Both Mr. Morrill and Respondents moved for summary judgment, and the lower court, overruling his motion awarded judgment to the Respondents, dismissing the complaint. The Court of Appeals affirmed.

He had no attorney during the various hearings and reviews of his case prior to filing this suit, and he may not

have adequately supported his contention as to political motivation with specific allegations and evidence to require a reversal on this ground alone.

However, we feel that the record sustains his contention that his separation was wrongful and unlawful, "arbitrary, capricious, and an abuse of discretion" regardless of whether any political motivation existed, because:

(1) The Civil Service Regulations were violated and procedural limitations were transgressed;

(2) The Regulations themselves, if such Regulations were technically followed, violated the letter and spirit of the Civil Service Act and the Administrative Procedure Act and other applicable statutes or misconstrued such applicable underlying statutes;

He also contends that even though it be adjudged that a claim for back pay should be determined in the Court of Claims, his assertion of it with his action for reinstatement should not result in dismissal of the claim but that since it is "in the interest of justice" the 1962 action of Congress, 28 U.S.C.A. 1406(c), requires that the District Court "shall . . . transfer such case to the Court of Claims. . . ." The U. S. District Court refused to do this.

## REASONS FOR GRANTING

This case is of great public importance, far transcending the issues vitally important (to him) as to whether Mr. Morrill is entitled to his Civil Service position (or at least a job in lieu thereof) and the very substantial sum of money to wihch he is entitled if he was wrongfully separated.

### I.

Indeed the very tradition of the Civil Service Commission is at stake. This Court has recognized that "Congress in-

tended to provide tenure" to career employees (with Civil Service status), who "were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons". Similarly we say that they cannot be "separated" from their positions in flaunting that tradition, the statutes, and the regulations thereunder. And our position here does not conflict with the agreed fact that legal separations can occur as a result of reductions in force properly effected in bona fide reorganizations.

At stake is the morale of hundreds of thousands of government civil service employees who have made a career of their loyalties and labor for their government. It is in the national interest, in the interest of national security even, that government employees (who have been told in acts of Congress and in their own employing agency's regulations that they have job tenure for which political adversity does not change the rules) should not have their faith in their government shattered, their peace of mind destroyed, and their economic security made precarious by being subject to whims of those above them.

Mr. Morrill, to his bitter disappointment, has not been able to get from the District Court or from the Court of Appeals any written opinion that might seek appeal to his reason to explain the rulings so far in this litigation. All he can learn is that those courts (by avenues not disclosed by their orders) have decided that there has been "substantial" compliance with applicable statutes and regulations that are valid. Whether he succeeds or not this Court provides his last chance to be furnished an opinion setting forth the law applicable to his case with any reasoning to explain it.

We submit, as respectfully as we may, that if this Court allows the affirmance orders to stand without any opinion it will in effect be stating an opinion in essence as follows:

## OPINION

"The Civil Service laws of the United States are actually ineffective and of no real meaning, chiefly a window-dressing to give the impression of fairness despite perpetuation of the spoils system of favoritism, both in hiring and firing.

"All that authorities have to do, in order to lawfully avoid applying the Civil Service theory and to ignore its policy as a stumbling block to their whims and prejudices in employing and firing, is to announce through the Federal Register that a 'reorganization' has been affected and there is a 'reduction in force' and that henceforth positions of non-wanted employees shall have a different title or that non-civil service employees or ones with lower preference ratings shall be entitled to the jobs of unwanted permanent career Civil Service employes, who may euphemistically then be called 'separated'.

"The official regulations and the official explanations of them do not mean a thing, and neither does the Civil Service Act nor the Veterans' Preference Act provided these are first nullified by the recitation of the quoted abracadabra about 'reorganization', 'reduction in force', etc. To clarify this ruling, we mean that lower rated employees in the same work at the same place for the same agency are entitled to displace higher rated permanent career employees at the whim of superior administrative officials if the appropriate abracadabra is used, and it was used in this case. All the displaced employee is entitled to be told is that the regulations are valid, the evidence supports the Civil Service actions, and applicable statutes and regulations have been complied with."

Mr. Morrill's personal welfare completely aside, and in addition to maintenance of the integrity of the Civil Service tradition, there are special and important reasons for granting certiorari in this case.

II.

There are "gaps" in the statutes which need to be filled as only this Court can fill them by its definition of such terms as "competitive level", "crossing competitive levels", and the like which made trouble in bringing about this case. The Government admits (Defendants' brief, p. 16), for example, that "the statute does not, however, give any definition of what is meant by 'competing employees' ". The full importance of definition — and uniform definition — of these terms will require briefing.

III.

The exact fact situation we have here appears not to have ever resulted in an opinion of any federal court so far as we can find. It is a subject that needs definitive judgment to put at ease a problem that tens of thousands of federal employees doubtless will be facing, indeed have already faced. It is really amazing that neither side has been able to produce any case exactly in point to dispose of the legal questions involved here.

IV.

Yet, if it be contended (as both sides indeed have) that cases have treated of analogous situations controlling here, we submit that the decision of the Court of Appeals for the Sixth Circuit conflicts with decisions of other federal districts and other circuits if not with those of this very Court itself!

Why do we contend this? Without benefit of any opinion from the lower courts we have to surmise the route by which they reached their affirming conclusions herein, but obviously for such orders to be consistent with the agreed facts of this case this Circuit must have taken the position that career-permanent civil employees have no more superior rights to

positions "abolished" through alleged reduction in force than do temporary excepted employees under the regulations. Respondents cited a Court of Claims case, *Novogroski* v. *United States*, 153 F. Supp. 421, as so holding, but we submit that other Court of Claims cases and District Court rulings from districts in other circuits than the Sixth have handed down opinions inconsistent with this idea in R.I.F. cases involving both "new" employees and lower-rated civil service employees in such cases as *T. Michael Smith* v. *The United States*, 151 Ct.Cl. 205, in *Daub* v. *United States*, 223 F. Supp. 609, in *Parks* v. *United States*, 147 F. Supp. 261, and in *Ritter* v. *Strauss*, 261 F. 2d 767, in all of which the mistreated employee was granted relief, as well as in cases such as *Pence* v. *Tobriner*, 349 F. 2d 717, in which the rule we rely on is recognized even if held not applicable under the facts of those cases.

While not R.I.F. cases, we think such cases as *Knotts* v. *United States*, 121 F. Supp. 630, *Crocker* v. *United States*, 127 F. Supp. 568, *Gadsden* v. *United States*, 78 F. Supp. 126, and *Blanow* v. *United States*, 309 F. 2d 267, sustain our position that arbitrary or capricious action resulting in a wrongful separation will result in its being set aside on review.

If these rulings are actually at cross purposes the Supreme Court ought resolve the conflicts. If they are not, then they do not cover the situation at hand and no other cases have done so either, so this Court's ruling is in that event needed just as badly.

## CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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# APPENDIX

No. 16,949

# UNITED STATES COURT OF APPEALS

For The Sixth Circuit

JAMES L. MORRILL,
Plaintiff-Appellant,

v.

ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture, et al.,
Defendants-Appellees.

## ORDER

(Filed March 15, 1967)

Before: CELEBREZZE, PECK and McCREE, Circuit Judges.

Appellant commenced this action in the United States District Court for the Western District of Kentucky pursuant to 28 U.S.C. § 1361, to obtain judicial review of the administrative action resulting in his separation from his civil service position.

Working for the Department of Agriculture, appellant received a permanent career appointment in the classified "Competitive Service," Tenure Group I, as State Performance Assistant, the position from which he was separated because of a reduction in force due to an administrative reorganization.

Seeking his former position, or in the alternative, an assignment to a position held by a temporary excepted employee who supedseded him in the same job, and back pay, appellant charges that the statutes and civil service regulations were flagrantly disregarded for politically motivated reasons.

Upon consideration of the briefs and oral argument, it is concluded that there has been substantial compliance with the applicable statutes and civil service regulations; that said regulations are valid; and that the record supports the Civil Service Commission's decision that the evidence submitted by appellant was insufficient to establish that the reorganization proceeding was a politically motivated sham. Accordingly,

IT IS ORDERED that the judgment of the District Court be, and hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ CARL W. REUSS
Clerk

(CAPTION OMITTED)

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ORDER

(Filed May 12, 1967)

Before: CELEBREZZE, PECK and McCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT.

/s/ CARL W. REUSS
Clerk

# In the Supreme Court of the United States

OCTOBER TERM 1967

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No. 477

JAMES L. MORRILL, PETITIONER

*v.*

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The orders of the court of appeals (Pet. App. 14-15) and of the district court (App. 16a-19a) are unreported.[1]

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[1] Appendix page numbers followed by an "a" refer to the appendix for plaintiff-appellant in the court of appeals. Appendix page numbers followed by a "b" refer to the appendix for defendants-appellees in the court of appeals.

## JURISDICTION

The order of the court of appeals was entered on March 15, 1967. A timely petition for rehearing was denied May 12, 1967. The petition for a writ of certiorari was filed August 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner's discharge was in compliance with Civil Service Commission regulations pertaining to the release of employees pursuant to a reduction in force.

2. Whether the regulations are consistent with Section 12 of the Veterans Preference Act.

## STATUTES AND REGULATIONS INVOLVED

Section 12 of the Veterans Preference Act, 5 U.S.C. 861 (1964)[2] provided in relevant part as follows:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference * * *, length of service, and efficiency ratings * * *.

The regulations governing reduction in force in effect when this case arose are set forth at 26 Fed. Reg. 1811, *et seq.* (Mar. 2, 1961) and are reproduced

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[2] After this case arose, Title 5 was recodified. Section 12 of the Veterans Preference Act now appears, without relevant changes of substance, at 5 U.S.C. 3501-3.

in the brief for defendants-appellees in the court of appeals, pp. 29-33. Section 20.302 of these regulations (presently 5 C.F.R. 351.602 (1964)), provides in relevant part as follows:

> Competing employees shall be selected for release from a competitive level under this part in the inverse order of retention standing, beginning with the lowest standing employee on the retention register.

Section 20.202 (presently 5 C.F.R. 351.404 (1964), provides in relevant part as follows:

> (a) An agency shall establish a retention register whenever a competing employee is to be released from a competitive level under this part.
>
> * * * *
>
> (c) A separate retention register shall be compiled for each competitive level.

Section 20.201(c)(2) (presently 5 C.F.R. 351.403 (b) (1964)) provides in relevant part as follows:

> Separate competitive levels shall be established for competitive positions as distinguished from excepted positions.

## STATEMENT

In 1961, the Kentucky State Agricultural Stabilization and Conservation Service (ASCS) Office underwent a reorganization, pursuant to which its staff was reduced from 61 to 48 full-time employees (App. 21b). As part of this reorganization, it was decided that the duties of State Performance Assistant could be performed by temporary employees, rather than by

full-time employees. Under Civil Service Commission regulations, such temporary employees, i.e., employees hired for not more than 180 days each year, are in Schedule A of the excepted service, 5 C.F.R. 213.3113 (a)(5) (1964), and, if non-veterans, have no protection against removal without cause. 5 C.F.R. 752.103 (a)(b), 752.104, 752.201(a)(2) (1964).

Petitioner was an employee of the Kentucky State ASCS Office, holding a full time job as State Performance Assistant. (App. 5b, 42b).[3] In this position petitioner was in the competitive service and entitled to protection of tenure. However, when the duties of his position were transferred to a temporary position in the excepted service, and petitioner was relieved from his full-time position, the Kentucky State ASCS Office chose not to hire petitioner for this temporary position.[4]

Petitioner's basic complaint is that he should have been allowed to replace one of 23 temporary em-

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[3] This job required him, among other things, to "instruct county ASC supervisors and reporters regarding ASC rules and regulations, how to discharge their duties as ASC employees and to check and rate their work." (App. 5b).

[4] Petitioner complained to the Civil Service Commission that "at the time of my termination there were employed by the Kentucky ASCS state office approximately twenty-three (23) persons doing exactly the same type of work that I had done." (App. 25b). However, petitioner also stated that only two of these persons were assigned to territory within commuting distance of his headquarters. Petitioner believed he should have been allowed to replace Mr. Lynn Neal (App. 3b). Mr. Neal himself was released only two months after plaintiff's release, because the temporary job had ended. (App. 41b).

ployees. The Civil Service Commission rejected this complaint, holding that under the regulations employees in the competitive service and employees in the excepted service do not compete for purposes of displacement and re-employment when an agency reorganization takes place. (App. 46b, 47b). The Commission also rejected petitioner's charge that he had been the object of political discrimination. (App. 39b). Both the district court and the court of appeals sustained the action of the Commission and refused to grant petitioner relief, holding that his discharge was in accordance with valid Civil Service regulations.

## ARGUMENT

1. Petitioner's discharge conformed to Civil Service regulations. These regulations provided, at the relevant times, that agencies undergoing reorganization must establish a "retention register" listing employees in order of their retention standing (which is determined with reference to their military record, performance rating, tenure of appointment and length of service). Sections 20.201(e), 20.202.[5] When a reorganization occurs, separation of employees must occur in inverse order of their standing on the retention register. Section 20.302. The regulations limit the scope of retention registers by providing a separate register for each "competitive level." Sections

[5] The citations refer to the Retention Preference Regulations set forth at 26 Fed. Reg. 1811 (Mar. 2, 1961). The present regulations, which are substantially similar to those in effect in 1961, are set forth at 5 C.F.R. Part 351 (1964).

20.202(c), 20.302. They require that each competitive level shall consist of positions which are sufficiently alike so that an employee may be moved from one position to another within the competitive level without undue interruption of the work program and "without change in the terms of the incumbent's appointment." Section 20.201(c)(1). This last requirement is implemented by the further provision that "separate competitive levels shall be established for competitive positions as distinguished from excepted positions." Section 20.201(c)(2).

Under these regulations, the Kentucky ASCS Office was fully justified in not granting petitioner displacement or reemployment rights with regard to the temporary position to which the duties of his job were transferred in the agency's reorganization. Under these regulations, petitioner had preference rights only as to jobs in his competitive level. The temporary position of State Performance Assistant was in the excepted service, while petitioner's job had been in the competitive service. The regulations established that competitive positions and excepted positions were not in the same competitive level and, accordingly, did not compete for retention preference in an agency reorganization.

2. Section 12 of the Veterans Preference Act, 5 U.S.C. 861 (1964) (which for present purposes is applicable to non-veterans such as petitioner) provides that "in any reduction in personnel * * *, competing employees shall be released in accordance with Civil Service Commission regulations." The statute does not define the term "competing employees," and

thus it is necessary for the Civil Service Commission to formulate practical distinctions in determining which employees shall compete for jobs in connection with a reduction in the work force. In the present case, the regulations do not give an employee in the competitive service the right to a job in the excepted service. Since an employee in the excepted service has no tenure protection, the right to employment in the excepted service would be meaningless. The Civil Service regulations simply recognize this fact. Section 20.201(c)(2), 5 C.F.R. 351.403 (1964).

The basic damage to petitioner's status was done when the duties of his position were transferred to a temporary position outside the competitive civil service. Contrary to petitioner's assertions, an agency's ability to place jobs outside the competitive service does not vitiate civil service protection for employees in the competitive service. Any such transfer must be approved by the Civil Service Commission, which issues the various schedules listing jobs which are excepted from the competitive civil service. See 5 C.F.R., Part 213. Petitioner has not attacked the determination that the position of temporary State Performance Assistant was properly included in Schedule A of the excepted service.

A further protection for Civil Service employees against arbitrary placement of their jobs in the excepted service lies in the rule that, even if the appropriate procedures are followed, discharges in connection with agency reorganizations will be overturned where it is shown that the procedures followed were

a mere sham, designed to cover a discharge for political motives. See *Pence* v. *Tobriner*, 349 F. 2d 717, 718 (C.A.D.C.). However, no such showing has been made here.

3. There is no conflict of decisions. In the only other decision on point, the Court of Claims upheld the validity of Civil Service Commission regulations prohibiting an employee in the competitive service from "bumping" employees with similar jobs in excepted positions:

> At the time that plaintiff was separated from the Government service there were several attorney positions in the Boston Office. All of these positions were occupied on excepted appointments and not in the competitive service. Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, 5 U.S.C.A. § 861, does not give a veteran the right to displace other employees from their jobs where it is necessary to cross competitive levels to do so.

*Novogroski* v. *United States*, 153 F. Supp. 421, 427 (Ct. Cl.).

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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